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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, APPELLANT

v.

THE STATE OF SOUTH CAROLINA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (NEA App. 1a–44a)[1] is not officially reported.

JURISDICTION

The judgment of the three-judge district court (NEA App. 50a) was entered on April 14, 1977, and the United States filed its notice of appeal (App. A,

[1] "NEA App." refers to the appendix to the Jurisdictional Statement in No. 77–422 for the National Education Association, the South Carolina Education Association, Nathaniel Brown, Eunice Doe, Willie Edney, Robert F. Hill, Anita P. Hunter, David Lawrence, Edward Pinckney, and Adolph Simmons.

infra) on June 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 2000e–6(b).

QUESTIONS PRESENTED

1. Whether in evaluating a claim of intentional discrimination the district court should have attributed evidentiary significance to the historical background and the sequential pattern of decisions by South Carolina and its school districts to utilize National Teacher Examination (NTE) scores in a fashion that had a disproportionate and adverse effect upon the certification of black teachers and the setting of black teachers' salaries.

2. Whether the district court erred in failing to shift the burden of proof after plaintiffs had established that defendants had continuously maintained a dual pay system along racial lines and that, coincident with desegregation, they had adopted employment practices that eliminated black teacher candidates.

3. Whether uses of an examination with a discriminatory effect can be sustained under Title VII if "rationally related" to a legitimate state objective in the absence of proof that the uses are demonstrably related to job performance.

4. Whether the district court erroneously applied the Title VII "business necessity" requirement in sustaining the certification and pay uses of the examination in the face of evidence that 47 out of 50 states utilize alternative certification schemes and no other state uses the NTE in determining pay.

5. Whether the Attorney General has independent authority to sue state and local governments charging a pattern and practice of racial discrimination in employment under Section 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (and Supp. V) 2000e–6.

6. Whether the use of the NTE made by the State of South Carolina is subject to the prohibitions of Title VII.

7. Whether the district court erred in holding that this suit did not present common questions of law and fact justifying certification of a defendant class of local school boards.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The texts of the Fourteenth Amendment to the Constitution and Section 703 of Title VII of the Civil Rights Act, 78 Stat. 255, as amended, 42 U.S.C. (and Supp. V) 2000e–2, are set forth at NEA App. 45a–46a. The pertinent provisions of Sections 706 and 707 of Title VII are set forth at App. B, *infra*.

STATEMENT

The United States filed this suit on September 15, 1975, alleging that defendants' uses of the National Teachers Examination (NTE) violated Title VII of the Civil Rights Act of 1964, as amended, and the Fourteenth Amendment. The suit was brought against the State of South Carolina ("State"), the Board of Education ("State Board"), the Retirement System ("Retirement System"), and the Budget and Control Board ("Control Board") of the State of South Caro-

lina, as well as three local school boards[2] named as representatives of the class of all local boards of education in the State. The South Carolina Education Association ("SCEA"), the National Education Association ("NEA"), and nine individuals successfully intervened as plaintiffs.[3]

One set of claims made by the United States and plaintiff-intervenors (hereinafter referred to as "plaintiffs") challenged the legality of defendants' use of NTE scores to fix teacher pay levels. Plaintiffs alleged that the NTE was adopted by the State as a determinant of pay levels in 1945 for the purpose, and with the effect, of continuing the racially dual pay scale that had been used by the State prior to that time, and that this purposeful discrimination violated the Fourteenth Amendment. The complaints also alleged that the continued use of the NTE to fix pay levels after the effective date of Title VII, as amended, violated the Act both because of defendants' racial purpose and because the pay use of the NTE

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[2] The Board of Trustees of the Charleston County School District, the Colleton County Board of School Trustees, and the Board of School Commissioners of School District No. 1 of Richland County ("Charleston, Colleton and Richland No. 1 Boards of Education").

[3] The complaint in intervention made allegations similar to those made in the complaint of the United States, and also alleged violations of 42 U.S.C. 1981 and 1983 and the due process clause of the Fourteenth Amendment. The individual plaintiffs sought intervention individually, and as representatives of the classes of persons wronged by defendants' discriminatory practices.

had a disparate racial impact and was not "job-related" or a "business necessity."

The second set of allegations challenged the use of the NTE, since 1969, to deny teaching certificates, and thus employment opportunities, to otherwise qualified applicants for certification. This claim was based upon allegations that the certification use of the NTE had been initiated, and was continued, for the purpose of denying employment opportunities to black educators in violation of Title VII and the Fourteenth Amendment and that the certification use violated Title VII for the additional reason that it had an adverse racial impact but was neither "job-related" nor a "business necessity."[4]

Plaintiffs sought injunctive relief and back pay for victims of the alleged discrimination.

A. THE HISTORY OF DEFENDANTS' USES OF THE NTE

1. THE INITIAL USE OF THE NTE

Since 1939, the funds used to pay the salaries of South Carolina's public school teachers have come from both the State treasury and the treasuries of local boards of education (P.F. 19; S–23, Report of Special Committee appointed pursuant to House Resolution No. 74 ("Committee Report"), February 5,

[4] With respect to the local defendants, the complaint alleged that local school systems had used state-established pay grades and certification levels to discriminatorily fix salaries and deny employment to black educators in violation of the Fourteenth Amendment and Title VII.

1941, pp. 10–11.[5] Prior to 1945–46, South Carolina maintained a dual pay scale for public school teachers explicitly based on race (NEA App. 19a).[6] In 1940, in *Alston* v. *School Board,* 112 F. 2d 992, the Court of Appeals for the Fourth Circuit held that racially dual pay scales in Virginia violated the equal protection clause of the Fourteenth Amendment. In 1941, a com-

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[5] "P.F." refers to numbered paragraphs of Plaintiff and Plaintiff-Intervenors' Proposed Findings of Fact. A copy of these Proposed Findings, with appendices, is being lodged with the Clerk of this Court.

The proposed findings contain citations to the record in accord with the exhibit number assigned by the district court clerk. Additionally, the proposed findings contain a parallel citation to the record in accord with a uniform citation system devised by the parties and described in Appendix A to these Proposed Findings.

Citations to other portions of the record are made according to the system adopted by the parties in the district court.

The state funds are channeled to local boards of education, and earmarked to pay the salaries of particular teachers in amounts determined by the "state aid salary schedule" annually adopted by the General Assembly. The local boards then appropriate additional monies, commonly called "local supplements," to augment the base salary provided by the State. The amount of the local supplement, if any, is determined by the individual local boards of education. By far the largest portion of a teacher's salary comes from state aid funds. For example, a first-year teacher with a bachelor's degree in Charleston County earned $8,031 in 1975–76, $6,831 of which came from state aid funds. RA–US–SC–1st, Attach. D, p. D–28; Ex. P–TP–8 (Plaintiff's Ex. No. 8 to the deposition of Terry Peterson).

[6] The differences in salary were substantial. For example, during academic year 1944–45, first-year black teachers with a college degree were paid $80.75 per month and first-year white teachers with a college degree were paid $103.75 per month from state aid funds. Moreover, these differences in salary by race were even greater when the differences in local supplements were added to the differences in state aid schedules (P.F. 20; Committee Report, pp. 10–11).

mittee appointed by the South Carolina General Assembly to study the State's teacher certification and pay system reported that the Fourteenth Amendment prohibited discrimination against Negro teachers, citing *Alston,* and noted the salary differences between black and white teachers in South Carolina (NEA App. 19a; Committee Report 10). The committee refused, however, to recommend the salary equalization remedy ordered by the *Alston* court. Instead, at its recommendation the General Assembly appointed a second committee to study further the problem of teacher certification and compensation (NEA App. 19a). As a result, the dual pay system continued unabated.

Between 1941 and 1945, state officials came under increasing pressure from black teacher organizations to equalize pay (P.F. 20, 25). After the report of the second study committee in 1944, the State Board of Education moved to abandon the explicitly racial pay system and to adopt prospectively a graded system of certification based upon future applicants' scores on the common examinations of the NTE (P.F. 35–36).[7]

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[7] The NTE is divided into two principal parts—the common examinations and the teaching area examinations. The common examinations purport to test knowledge "common" to all teaching fields (English, social studies, literature, fine arts, mathematics, educational philosophy and teaching techniques) and the respective teaching area examinations purport to test knowledge pertinent to particular teaching specialities (*e.g.*, art education, early childhood education, home economics education, etc.) (NEA App. 10a, n. 7).

Under this system every applicant would be given an A, B, C, or D grade certificate according to the following NTE score distribution:

A	507 and above.
B	353–506.
C	303–352.
D	302 and below.

The above schedule was intended to place approximately 25 percent of the applicants in the A category, 50 percent in B, 15 percent in C, and 10 percent in D, but no applicant would be denied certification (P.F. 36). Prior to acting on the pay schedules proposed by the Board, the legislature learned that the racial breakdown under the proposed system based on the NTE would be as follows (P.F. 39):

Grade	White teachers	Black teachers
A	32 percent	2 percent.
B	58 percent	25 percent.
C	9 percent	36 percent.
D	1 percent	37 percent.

After receiving this report, the legislature appropriated funds *only* for the new system of certification, thus, in effect, making the system retroactively applicable to currently certified teachers (P.F. 40). That was the first and only time that a new certification standard was retroactively applied from 1932 to 1976, the period of time for which such evidence is in the record. Since 90 percent of white teachers were in the higher two pay levels and 73 percent of black teachers in the lowest two pay levels, the effect of the NTE pay

system was to continue the racially dual pay schedule to that extent.[8]

2. CHANGES IN THE USE OF THE NTE PRIOR TO 1969

Between 1945 and 1957 the Board changed score requirements for different certification levels several times in order to correct deviations from the original percentage breakdown among the four certificate grades.[9] In 1957, the Board, for the first time, set score levels that were not based on projections of the percentage of all applicants who would be in a particular grade level.[10] No reason was given for the particular scores chosen; however, the change substantially lowered the score required for an A certificate and substantially raised the score requirements for B and C certificates (P.F. 48, 66, 68).[11] After the change,

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[8] The allotment from the "white" schedule for academic year 1944–45 was an amount between the A and B allotments for 1945–46 and the allotment from the "black" schedule for 1944–45 was between the C and D allotment for 1945–46 (RA–US–SC 1st, Attach. D., pp. D–6 to D–8). See n. 23, p. 22, *infra*. More than 80 percent of the State's black teachers held the highest paying certificate prior to the recertification scheme (P.F. 22).

[9] None of these requirements was made retroactively.

[10] Additionally, the new score levels for the first time resulted in a few applicants, virtually all of whom were black, being denied teacher certification (P.F. 68).

[11] The teacher pay grades, by NTE score, before and after the 1957 change, were as follows (Ex. P–M–63 (Plaintiff's Ex. No. 63 to deposition of John Maynard)):

Before:	After:
A 548 and above.	A 500 and above.
B 373–547.	B 425–499.
C 332–372.	C 375–424.
D 331 and below.	D 322–374.

more than 96 percent of the white teachers, but only 41 percent of the black teachers, earned scores sufficient for the A and B grades (P.F. 60, 68). Simultaneously, the Board substantially increased the salaries for A and B teachers while only marginally increasing the salaries for C and D teachers[12] and adopted a policy that for the first time denied state aid salary increments to C and D grade teachers who obtained advance degrees (masters or doctorates). Salary increases for advanced degrees were continued for A and B teachers (RA–US–SC 1st, Attach. D., pp. D–13 to D–14). The 1957 score changes coincided with the enactment by the State of numerous statutes designed to thwart desegregation and the adoption by the State Board of official policies of resistance to desegregation.[13]

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[12] For academic year 1956–57, the state aid for A and B teachers was increased $35.00 and $30.00 per month respectively, while the state aid for C and D teachers was increased only $9.00 and $6.40 per month respectively (RA–US–SC 1st Attach. D., pp. D–13 to D–14).

[13] In 1955 and 1956, the State Legislature enacted, *inter alia*, the following measures: No. 339, Section 2 (voiding teacher contracts if schools are closed as a consequence of court orders), 1955 Acts and Joint Resolutions of South Carolina, p. 660; No. 295, Section 1 (repealing laws providing for teacher re-employment), *id.* at 589; No. 57, Section 1 (repealing school attendance laws), *id.* at 85; No. 55, Section 3 (granting school trustees the power to transfer any child), *id.* at 84; No. 56, Section 1 (repealing laws governing the length of school term), *id.* at 85; No. 741 (unlawful for school districts to employ members of NAACP), 1956 Acts and Joint Resolutions of South Carolina, pp. 1747–1748; No. 712 (principals given power to transfer students if their enrollment threatens to disturb the peace), *id.* at 1715; No. 813 ($25,000 appro-

3. 1969 CHANGES

The next change in defendants' NTE use, and the last change prior to the filing of this suit, occurred in 1969, when the Board abandoned the practice of issuing graded certificates and adopted a system with only one certificate, called a "professional certificate." To qualify for a professional certificate, a person who was otherwise qualified (*i.e.*, who was a graduate of an approved teacher training program) had to score 450 on the common examinations and 450 on the applicable teacher area examination (TAE) of the NTE and have a minimum composite score of 975. Persons who did not qualify for a professional certificate could obtain a temporary, five-year warrant permit if they met all other requirements and obtained a minimum score of 400 on both the common examinations and applicable TAE, and a minimum composite score

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priated for special segregation committee's work), *id.* at 1932; No. 914 (resolution protesting the Supreme Court's decisions in *Brown* and directing that the State take such measures as appropriate to protect its sovereignty), *id.* at 2172–2176; No. 920 (resolution appointing committee to investigate activities of NAACP at S.C. State College), *id.* at 2182–2183; No. 927 (resolution continuing committee to study and report in view of nullification by federal courts of state constitution requiring separate schools), *id.* at 2197–2198. The legislative appropriations for fiscal year 1956–57 for state aid for teachers' salaries, supervision and overhead and maintenance and operation of the public schools and operation of school lunch programs were conditioned on the maintenance of "Racially Segregated Schools only" although similar appropriations for fiscal year 1955–56 had contained no similar limitation. Compare Section 20 of No. 813 at 1869 and Section 20 of No. 234 at 356, Acts and Joint Resolutions of South Carolina of 1956 and 1955, respectively.

of 850 (NEA App. 11a). The State Board froze teachers holding B, C, and D certificates at their 1969 pay grade unless they could meet the post-1969 requirements for a professional certificate (NEA App. 22a).[14]

Events immediately preceding and contemporaneous with the 1969 changes in certification procedures presaged the imminent desegregation of public schools and the certainty that black teachers would soon be teaching white students (NEA App. 14a). Data available to the State Board-appointed committee which proposed the 1969 changes showed that more than 30 percent of the black candidates but less than 1 percent of the white would be denied even a warrant under the new score requirements (NEA App. 11a; see also P.F. 80 and 81).[15] The committee also had before it a study relating NTE scores to success in student teaching which concluded that "the findings [of the study] would lead one to believe that the common examination of the NTE measures something other than teaching abilities" (P.F. 50; see also NEA App. 14a–15a). Nothing before the committee correlated NTE scores with successful teaching. Neither the minutes nor the final report of the committee show any

[14] Both warrant and professional certificate holders are initially placed in the "A" pay grade. However, warrant holders are denied additional pay for studies undertaken beyond the bachelor's level, and, after five years, they are not given any additional pay increments based on experience (RA–US–SC 1st, Attach. D., p. D–28).

[15] Nine out of 1,575 (0.57 percent) of the white candidates in 1966–67 and four out of 1,722 (0.23 percent) of the white candidates in 1967–68 scored below 400 on the common examinations (P.F. 80).

basis for the certification use the NTE or for the particular scores chosen other than a statement that "it seemed to be the consensus that South Carolina could live with [the scores for a warrant]* * *" (P.F. 53 and 54). Data from four administrations of the exam while the 1969 score requirements were in effect show that 72 percent of the black candidates and 6 percent of the white candidates failed to qualify for a professional certificate under the 1969 cut-off scores (P.F. 82; see also NEA App. 11a).

4. VALIDATION ATTEMPTS

Prior to the filing of this suit the State had not performed or attempted any validation study for its uses of the NTE.[16] Moreover, the Educational Testing Service (ETS) had informed the State on numerous occasions that using test scores to fix salaries was a misuse of the examinations, and ETS had indicated it would no longer permit the State to use the NTE if that use continued (P.F. 84–97).

After the United States had notified South Carolina of its investigation of the State's certification and pay practices, the State Board contracted with ETS to conduct a study "to validate" the State's use of the NTE for certification purposes. That study attempted to compare the content of the curricula of the various South Carolina teacher training programs

[16] The record shows that such research as had been conducted elsewhere with respect to uses of the NTE indicated that NTE scores were not appropriate prerequisites for initial selection or appropriate bases for setting salaries (P.F. 119–127).

with the content of the examinations and to estimate the score that a "minimally qualified" graduate would earn; it was completed and a report filed by ETS with the State in January 1976.

The study was divided into two parts—the knowledge estimation task and the content review task—and separate groups of South Carolina college professors performed these tasks for each different examination (P.F. 141; see also NEA App. 34a). The knowledge estimation panelists were asked to imagine a hypothetical group of 100 persons who were minimally qualified to teach effectively *and* who were minimally qualified to complete the academic program at the teacher training institution where the panelist taught. With this imaginary group in mind, the knowledge estimation panelists were instructed to review the questions in two forms of the NTE and estimate the percentage of persons in the imaginary group who would know the answer to each question. The content review panelists were asked to review the examinations and answer a series of questions comparing the content of the curricula at the colleges where they taught with the content of the examinations. The stated purpose of the content review task was to estimate the score that a "minimally qualified" applicant would earn (P.F. 142–144; see also NEA App. 33a–34a).

During the development of the record, a committee of the State Board reviewed the study, and in June, 1976, after discovery and record development closed,

the Board adopted new cut-off score requirements which differed depending on the teaching area, ranging from composites of 940 to 1198. Data analyses prepared by defendants showed that, depending on the teaching area, the new scores would eliminate from 69 percent to 100 percent of the otherwise qualified black candidates. Overall these projections indicate that the new score requirements would disqualify 82 percent of the black applicants for certification, and that the pool of certified teachers would be 96 percent white (see Appendix A to Plaintiff and Plaintiffs-Intervenors' Joint Brief of August 4, 1976, and sources cited in n. 1, p. 1).

B. THE DISTRICT COURT'S OPINION

1. CONSTITUTIONAL ISSUES [17]

The court first considered whether plaintiffs had proven purposeful discrimination, separately evaluating the certification and pay uses of the NTE. Stating that plaintiffs alleged four individual acts of intentional discrimination with respect to the certification use, the court separately analyzed the intent underlying the 1945, 1956, 1969, and 1976 decisions changing the certification requirements (NEA App. 9a–17a). In each case, the court found a lack of "direct

[17] The district court held that monetary claims of the SCEA, *et al.*, against the State and its agencies under the Fourteenth Amendment and 42 U.S.C. 1981 and 1983 were barred by the Eleventh Amendment, but that the comparable claims by the United States under the Fourteenth Amendment were not barred (NEA App. 6a–8a).

evidence" of intentional discrimination and that any inferences of such discrimination had been rebutted by reasonable explanations proffered by the State (NEA App. 9a–17a). The court concluded that plaintiffs "have not demonstrated the required discriminatory intent with respect to any of the specific decisions setting certification standards based on the NTE scores" (NEA App. 16a–17a).

The court similarly compartmentalized defendants' various decisions affecting the pay use of the NTE and separately considered the intent underlying each decision (NEA App. 17a–23a). The court held that the inference of discrimination from "the historical background of a dual pay system and a delay in implementing a unitary system" had been rebutted since "[t]he link between the new unitary pay system and the new certification system is not without a reasoned basis" (NEA App. 21a). The court concluded that "without independent proof, there is no associated discriminatory intent in linking the certification and salary systems" (NEA App. 21a). The court found both uses of the NTE "rationally relate[ed]" to defendants' legitimate business purposes (NEA App. 23a–27a).

2. TITLE VII ISSUES [18]

The court decided that plaintiffs' proof that the certification use of the NTE disqualified dispropor-

[18] The court held that the Eleventh Amendment did not bar either the United States' or the plaintiff-intervenors' claims under Title VII but that the Attorney General had no authority to bring a "pattern or practice" suit after March 24, 1974, and, therefore,

tionate numbers of blacks shifted the burden of proof to the defendants (NEA App. 33a). However, the court found that the burden had been met by defendants' validity study (NEA App. 33a–40a). The court found no deficiency in the "ETS decision to validate against the academic training program rather than job performance" (NEA App. 37a) and concluded that the test met the Title VII requirements because "the classification resulting from the test scores had a rational basis, that is, that it differentiated between persons who did and did not have some minimum verbal and communication skill [and that] * * * skill, in turn, had some rational relationship to the legitimate employment objectives of the employer" (NEA App. 33a). Recognizing that plaintiffs' evidence showed that the participants in the study were confused, the court nevertheless held that plaintiffs had failed to meet "their burden" of demonstrating "that the results were adversely affected" by the panelists' "misunderstanding[s]" (NEA App. 38a–39a).

Finally, the court concluded that the certification use of NTE met Title VII's "business necessity" requirement because plaintiffs had failed to prove that any alternative procedure would "achieve the State's

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that the United States' Title VII claims must be dismissed (NEA App. 29a–32a).

Because of its disposition of the merits of the statutory and Title VII claims and because the local school districts were "employers" within the meaning of Title VII, the court held that it need not reach the questions whether the state defendants were "employers" under the Act or whether teacher certification was covered by the Act (NEA App. 28a–29a).

purpose in certifying minimally competent persons" as well as the NTE (NEA App. 42a).

The court held that use of the NTE to fix pay scales was also lawful under Title VII since the State had shown a "rational relationship to a legitimate employment objective" (NEA App. 43a). The scheme was "an incentive for improvement, so that teachers without adequate knowledge * * * will upgrade their capability" (NEA App. 43a). The pay use was found to be a business necessity since plaintiffs had not demonstrated any alternative to the pay use of the NTE "within reasonable limits of risk and cost." (NEA App. 43a).

THE QUESTIONS ARE SUBSTANTIAL

1. The district court's decision sanctions a teacher certification scheme that has an exclusionary effect on black applicants for teaching certificates and will predictably lead to overwhelmingly white faculties in the public school systems in South Carolina. Between 1969, the date the NTE was first used as a certification instrument, and 1976, the date the NTE score requirements were raised, the State's use of the NTE eliminated approximately 30 percent of the black applicants for certification (see p. 12, *supra*). During the period 1967 to 1975, the proportionate representation of black teachers in South Carolina's public schools declined from 34.4 percent to 29.3 percent (NEA App. 10a). The new NTE requirements will disqualify approximately 83 percent of the black applicants for teacher certification and result in a pool of certified

teachers that is more than 95 percent white (see p. 15, *supra*).[19]

The district court's opinion also approves a teacher compensation scheme that permits the State to continue paying a large group of incumbent black teachers lower wages than their colleagues. This disparate and adverse treatment of approximately 3,000 black teachers will continue until, through attrition, they are replaced by newly certified teachers, virtually all of whom will be white.[20]

This decision if permitted to stand will have a serious precedential effect in other school systems now desegregating or recently desegregated. The NTE has been used in a number of such systems to eliminate black educators and disqualify black teacher applicants. See *Baker* v. *Columbus Municipal Separate School District*, 462 F. 2d 1112 (C.A. 5), affirming 329 F. Supp. 706 (N.D. Miss.); *Walston* v. *County School Board of Nansemond County, Virginia*, 492 F. 2d 919 (C.A. 4); *United States* v. *Chesterfield County School District*, 484 F. 2d 70 (C.A. 4); *Pickens* v. *Okdona Municipal Separate School District*, 3. Race Relations

[19] In contrast, the score requirements in effect from 1969 through 1976 disqualified 1 percent of the white applicants and the requirement in effect since 1976 will disqualify approximately 17 percent of the white applicants (see Appendix A to Plaintiff and Plaintiff-Intervenors' Joint Brief of August 4, 1976, and scores cited in note 1 thereof).

[20] During 1975–1976, the last year for which this kind of evidence is in the record, 3,090 black teachers and 659 white teachers holding B, C, and D certificates were employed in South Carolina (P–139 (Stip. No. 10 and attachment)).

Law Survey 180 (1971).[21] Two states aside from South Carolina—North Carolina and Mississippi—currently use NTE for certification purposes. North Carolina adopted its use in 1964 on the eve of desegregation and Mississippi adopted its use in 1975 in the wake of desegregation. The legality of North Carolina's use of the NTE for certification purposes under Title VII and the Fourteenth Amendment is at issue in *United States* v. *State of North Carolina,* 400 F. Supp. 343 (E.D. N.C.) (three-judge court), vacated, 425 F. Supp. 789 (E.D. N.C.) (three-judge court).

Until the district court sanctioned defendants' practices, the courts had consistently struck down such uses of the NTE as racially discriminatory. Indeed, the district court's decision is not only inconsistent with Title VII and Fourteenth Amendment principles established by this Court, but is in direct conflict with decisions both of the Court of Appeals for the Fourth Circuit and of another three-judge district court that considered the legality of using the NTE for selection of teachers and pay uses, respectively. See *Walston* v. *County School Board of Nansemond County, Virginia, supra; Georgia Association of Educators* v. *Nix,* 407 F. Supp. 1102 (N.D. Ga.).

2. The record in this case contains every kind of evidence cited by this Court in *Arlington Heights* v.

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[21] See, also, *Morgan* v. *Hennigan,* 375 F. Supp. 410, 464 (D. Mass.), affirmed *sub nom. Morgan* v. *Kerrigan,* 509 F. 2d 580 (C.A. 1), certiorari denied, 421 U.S. 963.

Metropolitan Housing Development Corporation, 429 U.S. 252, 268, as important to the resolution of claims of purposeful discrimination. The district court purported to follow *Arlington Heights* (NEA App. 9a) but inexplicably failed to attribute significance to plaintiffs' unrebutted showings of the very kind of evidence specified by this Court to be highly pertinent.

In *Arlington Heights,* the Court recognized that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (429 U.S. at 266). Proof of intent will often be found in the careful analysis of sequential steps as illuminated by the totality of the historical context in which they occur. In summarizing (but not exhausting) the kinds of evidence clearly probative of a discrimination claim, the Court stated explicitly (429 U.S. at 267–268; emphasis added):

> The historical background of the decision is one evidentiary source, particularly if it reveals a *series of official actions* taken for invidious purposes. * * * The specific *sequence of events* leading up to the challenged decision also may shed some light on the decisionmaker's purposes. * * * Departures from the normal *procedural sequence* also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant * * *.
>
> The legislative or administrative history may be highly relevant, especially where there are

> contemporary statements by members of the decisionmaking body, minutes of meetings, or reports. [Footnotes omitted.]

The key element to understanding the origins and development of South Carolina's salary scheme is the "sequence of events leading up to the challenged decision" (429 U.S. at 267) and the "historical background" (*ibid.*) in furtherance of which it occurs. Prior to July 1, 1945, South Carolina paid black teachers less than white teachers simply because of their race. When South Carolina finally altered its overtly dual pay system, five years after *Alston* v. *School Board, supra,* declared it unconstitutional, it substituted a four-grade, NTE-based system which left the dual system of pay virtually intact. Before recertification under the NTE scheme, 80 percent of the state's black educators held the highest level of certificate; after recertification, only two percent held the highest certificate.[22] Moreover, when the explicitly racial salaries for 1944–45 are compared with the 1945–46 salary schedule based on the NTE, the minimal change from the overtly dual system is apparent.[23]

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[22] The percentage of teachers, by race, assigned each certificate grade is set forth at p. 8, *supra*. See also P.F. 22.

[23] The following chart shows the monthly state aid allotment for first-year teachers holding bachelor's degrees by race for 1944–45 and by NTE salary grade for 1945–46 (RA–US–SC–1st Attach. D., pp. D-6 to D-8):

A Teacher (1945–46)	105.00
WHITE Teacher (1944–45)	103.75
B Teacher (1945–46)	100.00
C Teacher (1945–46)	90.00
BLACK Teacher (1944–45)	80.75
D Teacher (1945–46)	80.00

The 1944–45 state aid schedule based teacher salaries on three factors: race, education, and years of teaching experience, and the 1945–46 schedule based teacher salaries on three factors: NTE scores, education, and years of teaching experience.[24] Race was the single most important factor in determining a teacher's 1944–45 salary and the NTE score was the single most important factor in determining a teacher's 1945–46 salary.[25]

A similar sequential pattern placed in its historical context reveals the invidious intention behind the 1969 decision to set new score requirements for certification. Indeed, like the pay decision, the certification decision was made in response to an imminent threat to a then-existing discriminatory practice. This Court declared "separate but equal" educational facilities unconstitutional in 1954. South Carolina responded in 1956 with a plan of "massive resistance," including increased pay disparities between black and white teachers accomplished by adjusting NTE-based pay

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[24] As of 1945–46, 90 percent of the white teachers were in the highest pay levels and 73 percent of the black teachers were in the lowest levels. The district court apparently believed that it was significant that the 1945–46 salary levels were, in part, dependent upon the teachers' education and experience (NEA App. 21a). The court apparently thought that these facts evidenced nondiscriminatory intent, in essence holding that all salary determinants must be discriminatory or any inference of discrimination is rebutted. However, both the black and white pay scales used education and experience as partial pay determinants in 1944–45 and, without question, the 1944–45 dual pay schedule was purposefully discriminatory. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542.

[25] RA–US–SC–1st, Attach. D., pp. D–6 to D–8.

grades.[26] In 1969, fifteen years after *Brown* v. *Board of Education,* 347 U.S. 483, defendants faced the reality of desegregation and defendants respond with a certification scheme that has denied teaching certificates to more than 70 percent of the black, but less than 6 percent of the white, applicants for certification.[27] Only after this suit was filed did defendants, for the first time, attempt to ascertain if the NTE was related to teaching ability, and it was a study, undertaken for this purpose, that prompted the 1976 adjustment in their score requirements.

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[26] Viewing the 1945 and 1956 decisions solely as pay decisions, the pattern of discrimination becomes apparent. The 1956 decision actually intensified the discriminatory effect of the 1945 decision on the pay of the black teachers. Neither decision significantly concerned teacher certification, although the district court analyzed them as if they did. Without addressing the pay implications of the 1956 decision, the court held that because "[t]he State Board did not move to change the system when it discovered that very few blacks were excluded" and the Board kept the same system for eleven more years, there was no evidence of racial discrimination (NEA App. 14a). This analysis ignores the fact that South Carolina continued to maintain a dual school system into the late 1960's and the State needed black teachers to staff the black schools.

[27] The only reason articulated for the 1969 score requirements was that the scores were "what we can live with" (see p. 13, *supra*). This statement is revealing, given three facts known to the committee making the recommendation: (1) The requirements would eliminate 30% of the black applicants for certification and result in adverse treatment of another 40% of the black applicants (see p. 12, *supra*); (2) faculty desegregation was imminent (NEA App. 14a); and (3) there was an acute teacher shortage in the state (NEA App. 40a). Defendants had no evidence which indicated that the NTE predicted teaching success or that NTE scores positively correlated with significant elements of the job of teaching.

Finally, the record below indicated that the 1945 and 1969 decisions represented substantial procedural and substantive departures from previous practice and that over the period of defendants' NTE use the State has engaged in a wide-ranging pattern of related forms of race discrimination. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301; *Briggs* v. *Elliott*, consolidated with *Brown* v. *Board of Education*, 347 U.S 483; *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C.).[28] This showing established a *prima facie* violation of the Fourteenth Amendment. See *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189, 209–210; *Chambers* v. *Hendersonville City Board of Education*, 364 F. 2d 189, 193 (C.A. 4) (*en banc*).

Unaccountably, the district court nevertheless found no persuasive evidence of intentional discrimination. This failure to attribute significance to unrebutted evidence highly pertinent to the claims of intentional discrimination conflicts with this Court's opinion in *Arlington Heights* relating to historical background

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[28] This demonstration of purposeful discrimination, we submit, is sufficient to foreclose any attempt to validate use of the NTE under Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, teaches that even if a test or other employment screening device is shown to be job-related, its use can be forbidden if it can be shown "the employer was using its tests merely as a 'pretext' for discrimination." See, also, *City of Richmond* v. *United States*, 422 U.S. 358, 378–379. Nevertheless, the attempt to validate the NTE for the uses the State makes of it was insufficient under standards already enunciated by this Court (see pp. 28–37, *infra*).

and the inferences properly to be drawn from sequential analysis. Indeed, the district court went so far as to state explicitly that even if the pre-1976 NTE decisions were "purposefully discriminatory" the intent underlying those decisions would be "without probative value as to the [intent underlying the] 1976 decisions" (NEA App. 16a). Similarly, by separately considering each of the State's NTE decisions without regard to defendants' pattern of conduct, the district court rendered meaningless the evidence of "sequence of events." By compartmentalizing its analysis of the intent underlying each NTE decision, the court obscured defendants' pattern of discrimination and ignored the fact that the record "reveals a series of official actions taken for invidious purposes." *Arlington Heights* v. *Metropolitan Housing Development Corporation, supra,* 429 U.S. at 267. Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (" '[T]he character and effect of a conspiracy [alleged to violate anti-trust laws] are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole' ").

The district court's decision also conflicts with the governing legal standard established by the Fourth Circuit *en banc* in *Chambers* v. *Hendersonville City Board of Education, supra,* and approved by this Court in *Keyes* v. *School District No. 1, Denver, supra.* In *Chambers* the court of appeals held that a *prima facie* case of discrimination was established where a school district substantially diminished the number of

black faculty members coincident with the elimination of an unconstitutional dual system of student assignment. As this Court stated in *Keyes,* evidence of disproportionate discharge in this context " 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence' " that race was not among the factors motivating their acts (413 U.S. at 209). The district court should have applied the *Chambers-Keyes* standard here where the certification levels of virtually all of the black educators were downgraded coincident with the elimination of the dual pay system [29] and where the 1969 adoption of the certification use of the NTE occurred on the eve of public school desegregation. The institution of these requirements that had a severely disproportionate effect on black applicants for teaching certificates coincident with the invalidation of dual pay and

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[29] The minutes of the State Board confirm that discrimination was the motivating factor behind defendants' "recertification" plan. For example, on June 11, 1941, the Board was advised that "[i]f the case [against the dual pay system] were presented to a Federal Court now, they would have to issue an injunction * * * [to enjoin the State] from paying * * *. '[T]he State cannot pay the number of Negro teachers in South Carolina now holding first-grade certificates * * * [salaries equal to those of white teachers], and there must be a reclassification or a reduction in salary' " (P.F. 22, 23).

Additionally, no reasons were given for the chosen percentage distribution among the different pay grades, but the percentage breakdown that would result, by grade and by race, was known to the legislature, when it was retroactively applied to all teachers in the state. As noted above (p. 8, *supra*), this is the only time any certification requirement has been retroactively applied in the last 45 years, the period of time covered by the record.

the desegregation of faculty establishes a *prima facie* showing that they are the product of intentional discrimination violative of the Fourteenth Amendment. *Chambers* v. *Hendersonville City Board of Education, supra,* 364 F. 2d at 193; *Keyes* v. *School District No. 1, Denver, supra,* 413 U.S. at 209–210; *Walston* v. *County School Board, supra,* 492 F. 2d at 924.[30]

3. The district court acknowledged that plaintiffs had established a *prima facie* Title VII violation[31]

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[30] The district court never purported to place any evidentiary burden upon the defendants. The court repeatedly stated that "plaintiffs have not demonstrated the required discriminatory intent" without ever explaining why plaintiffs' evidence of dramatic discriminatory effect coincident with the elimination of alternate unconstitutional methods of discrimination did not shift the burden of proof to defendants (NEA App. 16a–17a). Certainly the court never required a showing of clear and convincing evidence that race was not among the factors motivating the decisions. Instead, the district court repeatedly relied upon the alleged disparity among teacher training programs (*e.g.*, NEA App. 24a) as a sufficient justification rebutting any "inferences" arising from plaintiffs' evidence. But this is exactly what this Court in *Keyes* said cannot be done (413 U.S. at 210): "[I]t is not enough * * * that the school authorities rely upon some allegedly logical, racially neutral explanation * * * [without] adduc[ing] proof sufficient to support a finding that [discriminatory] * * * intent was not among the factors that motivated their actions."

[31] The state defendants contended in the district court that they were not "employers" or "employment agencies" within the meaning of Title VII, and the district court did not decide this question because of its general conclusion as to liability (NEA App. 28a–29a). The state defendants are properly subject to Title VII. The Attorney General is not limited to bringing Section 707 suits against employers, but may sue "any person or group of persons * * * engaged in a pattern or practice of resistance to the full enjoyment of * * * rights" secured by Title VII. "Persons" include governmental bodies (Section 701(a), 42 U.S.C. (Supp. V) 2000e(a)), and there is no requirement in Title VII that a

by showing that defendants' pay and certification uses of the NTE have a dramatic adverse impact on black educators (NEA App. 33a, 42a–43a, and *supra*, p. 15). The court, however, sustained South Carolina's pay use of the NTE because it was "rationally related" to the defendants' stated goal of providing teachers with an "incentive for improvement."[32] and sustained

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"person" also be an "employer." But see *Tyler* v. *Vickery*, 517 F.2d 1089 (C.A. 5), certiorari denied, 426 U.S. 940.

In any event, the state and state agencies are, in fact, "employers" within the meaning of Title VII (Section 701(b), 42 U.S.C. (Supp. V) 2000e(b)). The 1972 amendments provided that "governments, governmental agencies [and] political subdivisions" are "persons" within the meaning of the Act (Section 701(a), 42 U.S.C. (Supp. V) 2000e(a)), and that the term "'industry affecting commerce'" includes "any governmental industry, business, or activity" (Section 701(h), 42 U.S.C. (Supp. V) 2000e (h)). Although the local school districts are the immediate employers of teachers, the districts are subject to the "policies, rules and regulations" adopted by the State Board (S.C. Code 21–1, 21–4, 21–45 (1975 Cum. Supp.)), and the state defendants perform many functions that are generally performed by employers. Even if the state defendants were not the "employers" of the teachers employed by the local school district, they wuld still be "employers" within the meaning of Section 701(b) and thus would be prohibited from discriminating against the employees of other employers. *Sibley Memorial Hospital* v. *Wilson*, 488 F.2d. 1338, 1341 (C.A.D.C.). A contrary interpretation of Title VII would frustrate the intent of Congress which was particularly concerned with the rights of teachers. S. Rep. No. 92–415, 92d Cong., 1st Sess. 11–12 (1971).

[32] Apparently the court believed that the pay grades provided low scoring teachers an incentive for continuing their formal education beyond the bachelor's level. See NEA App. 43a. However, since 1957, C and D grade teachers, presumably the teachers with the greatest need for improvement, have been denied pay increases for continuing their education beyond the bachelor's degree. Similarly, warrant teachers are denied salary increases for post-

the certification use because it "rationally" distinguished between persons with minimum verbal and communication skills and these skills were "rationally related" to defendants' employment objectives. In both instances the court applied an erroneous legal standard. As this Court stated in *Washington* v. *Davis,* 426 U.S. 229, under Title VII, "it is an insufficient response [to a *prima facie* showing] to demonstrate some rational basis for the challenged practices" (426 U.S. at 247).[33] Title VII requires defendants to show that their NTE pay use is "demonstrably" or "manifestly" related to job performance. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 436; *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 422.

Not only is the Title VII standard of review more stringent than the standard applied by the Court, but

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graduate studies. Thus, the state's pay scheme actually discourages low-scoring teachers from continuing their education. See p. 12, n. 14, *supra.*

No evidence was introduced supporting defendants' pay use of the NTE. Even ETS, the NTE's producer, admonishes its customers that using the NTE for salary determinations cannot be justified.

[33] In essence, the district court applied the traditional standard for constitutional review of a state statute challenged under the due process clause of the Fourteenth Amendment. In *Washington* v. *Davis,* 426 U.S. 229, this Court held that the standards for establishing a *prima facie* violation of Title VII were different. Similarly, the burdens that defendants must meet to rebut a *prima facie* showing under the due process clause and Title VII are also different. Compare *McGowan* v. *Maryland,* 366 U.S. 420, 425–426, with *Griggs* v. *Duke Power Co.,* 401 U.S. 424, and *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425.

the reference point must be successful job performance. Even if defendants demonstrated that NTE-based pay schedules provided an incentive for teachers to increase their academic training, they would not have shown that this increased training is a requirement for successful performance as a teacher. As this Court said in *Washington* v. *Davis, supra,* "[i]t is necessary * * * that they [the employment practices] be 'validated' in terms of *job performance* * * *, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question" (426 U.S. at 247; emphasis added). Defendants offered no proof on the relationship of the pay uses of the NTE and the acquisition of necessary skills and the only evidence on the question suggests that there is no correlation between NTE-based pay scales and performance.[34]

Defendants also never demonstrated a manifest relationship between the certification uses of the NTE and job performance. Instead of requiring that the test be validated against job performance, the court sustained the NTE certification use because it was

[34] Defendants' "validity study" failed even to consider the question of the validity of the pay use of the NTE. However, the record shows that the actual performance evaluations of the "B," "C," and "D" grade teachers employed in the three defendant local districts are indistinguishable from the evaluations of their more highly paid colleagues (P. 138 (Stip. No. 11 and attachments thereto)).

rationally related to job *training*. The district court erroneously held that the validity study design that ignored job performance was adequate to meet Title VII review, based on this Court's statement in *Washington* v. *Davis, supra,* 426 U.S. at 250–251 (emphasis added), that "a positive relationship between the test and training-course performance was sufficient to validate the former, *wholly aside from its possible relationship to actual* [*job*] *performance as a police officer.*"[35] The district court's reliance on this passage is misplaced, because of the fundamental difference in the way the defendants in the two cases used the challenged examinations. The examination at issue in *Davis* was a precondition for job-related training and, indeed, the training itself constituted the first several weeks on the job. By contrast, the NTE requirement comes at the conclusion of a prospective teacher's educational training and is a precondition for employment of teachers. The best indicator of a prospective teacher's performance in his teacher training program is the prospective teacher's academic record. Yet South Carolina uses the NTE for the sole purpose of disqualifying persons who have successfully completed the teacher training programs. The failure to recognize this fundamental difference in the two cases caused the district court to sustain the adequacy of a study design that did not determine whether success on the NTE was related to success as a teacher.[35]

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[35] Instead of focusing on the job of teaching, the "validity study" focused on teacher training. This approach assumed (1) that there

The district court also held that defendants' validity study was adequate, notwithstanding confusion by the study's participants. Testimony of persons who participated in defendants' validity study showed that at least 26 of the 81 failed properly to perform the substantive tasks they were assigned (P.F. 174–177, 191). In at least nine additional cases, the testimony did not definitively establish whether the panelist did or did not properly perform his or her assigned tasks (P.F. 174, 178). This testimony confirms the weight of the expert testimony which variously described the panelists' tasks as "very difficult," "confounding," and "a high level exercise in abstraction" (P.F. 163–164, 167).[36] The district court stated (NEA App. 38a): "[T]he key question is not whether some of the panel members failed to understand the instructions or for other reasons failed to follow the instructions, but whether they would have reached any different result if they had understood and followed the instructions." The district court's decision here conflicts with *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 432–433, where this Court rejected a validation study that was based on "subjective supervisorial

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was a common teacher training program at the twenty colleges and universities in South Carolina (P.F. 219–227) and (2) that the knowledge sought to be imparted by this common program is essential to successful teaching (Appendices C, D to Plaintiffs' Joint Reply to Brief *Amicus Curiae* for ETS).

[36] In addition, the *majority* of panelists who testified (1) failed to prepare for their assigned tasks as they were instructed to do (P.F. 180, 188) and (2) were asked to review questions on subject matter they did not teach (P.F. 181, 192–194).

rankings," where the "supervisors were asked to rank employees by a 'standard' that was extremely vague and fatally open to divergent interpretations." The Court noted that "[t]here is no way of knowing precisely what criteria of job performance" were being considered or "whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind" (422 U.S. at 433). Thus, the Court concluded the Albemarle's validation study did not "justify a testing system with a racially discriminatory impact" (*ibid.*). The Court's ruling in *Moody* makes it clear that once plaintiffs show substantial "misunderstanding" in the conduct of a validity study used to defend Title VII claims, the study-based defense must fail. Plaintiffs have no additional burden, as the district court erroneously held, of showing the "effect" of the misunderstanding—*i.e.*, of showing what the results of a properly validated test would be.

Even if defendants had proved that their uses of the NTE were job-related, the district court erred in concluding that they were "business necessities." The district court held that a job-related employment practice would fail Title VII's business necessity requirement *only* when an alternative employment procedure would achieve the employer's legitimate employment objective as well as the challenged practice[37] (NEA App. 40a–41a). This standard is errone-

[37] The district court viewed its version of the job-relatedness requirement as conceptually different from the business necessity test. Consequently the court did not perceive job-relatedness as the threshold question in the business necessity inquiry.

ously narrow,[38] and inconsistent with *Dothard* v. *Rawlinson,* No. 76–422, decided June 27, 1977, in which this Court stated that a job-related employment practice, discriminatory in effect, must be *"necessary* to safe and efficient *job performance"* in order to pass Title VII scrutiny (slip op. 10, n. 14, emphasis added). See also, *United States* v. *Bethlehem Steel Corporation,* 446 F. 2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.,* 444 F. 2d 791, 798 (C.A. 4).

The district court's rule negates the necessity requirement by permitting the employer to establish "relevant" employment objectives that may not be necessary to job performance and sustaining a test as "necessary" even though alternative practices might meet the same goal without a similar racially disparate effect. Rather than requiring South Carolina to show that necessity requires it to utilize the NTE as it did in order to select those who can perform the job of teacher, the district court permitted South Carolina to establish an objective "relevant" to performance as a teacher, namely "individual achievement with respect to specific subject matter content," and its uses of the NTE testing because NTE scores would allegedly be a more accurate measure of this achievement than grades at schools where there are

[38] Clearly if there are less discriminatory, more effective employment practices available to an employer, the challenged practice cannot be a "business necessity." Indeed, in such a case it would be proper to infer that the challenged practice is merely a "pretext" for purposeful discrimination. See *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425, 436.

"variations in admissions requirements, academic standards and grading practices" (NEA App. 42a).[39] Thus, the court substituted a standard of comparative advantage for the statutory necessity requirement. In addition, it failed to assign any weight to relative discriminatory impact in determining which alternative best serves the state's needs.

Only the court's failure to require a necessary connection between NTE use and the selection of teachers who can perform allowed it to sustain the pay scheme in the face of the State's prospective abandonment of the graded pay scales in 1969 (p. 11, *supra*), the State Department of Education and State Board of Education's continued opposition to the graded system (P.F. 98–111), and the fact that South Carolina is the only state which uses the NTE to determine teacher salaries. Utilizing a similar analysis, the court erroneously held that the certification use of the NTE was a business necessity in the face of uncontradicted evidence that only three states—Mississippi, South Carolina, and North Carolina—use NTE cutoff

[39] Indeed, the record shows that even those teachers who have received NTE scores well below those required by South Carolina as a prerequisite for certification nevertheless perform satisfactorily and even often at the top of the performance scale. For example, in Charleston County, 334 teachers scored below the NTE cut-off score implemented on November 1, 1976. However, of these 334 teachers, 329 had been rated by the school district as satisfactory or better, and, indeed, 73 of them had been given the maximum rating. (Appendix C to Plaintiffs' Joint Reply to the Brief *Amicus Curiae* for ETS and sources cited therein.)

scores as a precondition for certification (P.F. 268)[40] and the fact that more than thirty states have found certification upon completion of an approved program of education, without any use of the NTE, to be a satisfactory teacher selection device (P.F. 264).

The district court thus pervasively failed to apply the proper legal standards under Title VII.

4. The district court's decision that the Attorney General's authority to sue state or local governments is conditioned upon a referral from the Equal Employment Opportunity Commission (EEOC) is grounded upon a failure to appreciate the statutory distinction between individual claims and pattern and practice actions.

Prior to 1972, enforcement of Title VII with respect to individual complaints of discrimination was solely in the hands of private parties. The Equal Employment Opportunity Commission was limited to an investigation and conciliation role and the Department of Justice was without any enforcement authority with respect to individual claims. The 1972 amendments of Title VII extended coverage to state and local governments and for the first time gave the Commission authority to enforce the Act through litigation in federal court.[41] Under Section 706 of Title VII,

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[40] At the time the Proposed Findings were submitted, North Carolina was enjoined from continuing its certification use of the NTE; however, the injunction has since been vacated, see 425 F. Supp. 789, and we are advised that North Carolina has resumed this use of the examination.

[41] Section 706(f)(1), 42 U.S.C. (Supp. V) 2000e-5(f)(1); Section 707(e), 42 U.S.C. (Supp. V) 2000e-6(e).

the Commission investigates charges filed by allegedly aggrieved individuals and, after a reasonable cause determination and conciliation attempts may bring a civil suit against any respondent "*not* a government, governmental agency, or political subdivision * * *."[42] Suits under Section 706 based upon an individual claim against a public employer can only be brought by the Attorney General and only after referral by the Commission. Section 706(f)(1), 42 U.S.C. (Supp. V) 2000e–5(f)(1) states:

> In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

The district court applied this conciliation and referral duty in suits based upon individual claims to pattern and practice suits as well. But the Attorney General's authority to bring pattern or practice suits against public employers is *not* derived from Section 706 and is distinct from the Commission's administrative enforcement efforts under that section. Section 707(a), 42 U.S.C. 2000e–6(a), provides for unconditional enforcement authority by the Attorney General in pattern or practice litigation. That Section provides

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[42] Section 706(f)(1), 42 U.S.C. (Supp. V) 2000e–5(f)(1) (emphasis supplied).

now, as it did prior to 1972, that the Attorney General can bring suit:

> whenever [he] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described * * *.

As the district court recognized, the function of Section 707(a) is to place the authority to litigate pattern and practice suits against state defendants in the hands of the Attorney General (NEA App. 31a–32a).[43]

The Attorney General's duties under Section 707(a) are explicitly enumerated in that section and are not made dependent upon prior administrative proceed-

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[43] See S. Rep. No. 92–415, 92d Cong., 1st Sess. 28 (1971); 118 Cong. Rec. 7567 (1972) (remarks of Rep. Erlenborn). Other district courts have also held that the Attorney General may bring a pattern or practice suit only after a referral from the Equal Employment Opportunity Commission. See *United States* v. *State of North Carolina*, E.D. N.C., No. 75–0328–Civ–5 (decided January 27, 1977), appeal pending, C.A. 4, No. 77–1614; *United States* v. *Board of Education of the Garfield Heights City School District*, N.D. Ohio, No. C–75–689 (decided October 5, 1976), appeal pending, C.A. 6, No. 77–3012; *United States* v. *Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal.), appeal pending, C.A. 9, No. 76–2539. Other district courts have held that only EEOC may bring a pattern or practice suit against a governmental employer. See *United States* v. *Pompano Beach*, S.D. Fla., No. 76–6059 Civ.–NCR (decided July 18, 1976); *United States* v. *Pima County Community College District*, 409 F. Supp. 1061 (D. Ariz.), appeal pending, C.A. 9, No. 77–1965.

ings. "The only prerequisite for the Attorney General to bring a civil action under § 2000e–6 [Section 707] is that he have reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination." [44]

The district court concluded that a different result is mandated by Section 707(c) and (e) as added by the 1972 Amendments to the Act (NEA App. 29a–32a). But Section 707(c) has no bearing on pattern and practice suits against the states. That Section merely transferred to the Commission the Attorney General's pre-1972 authority to initiate pattern and practice actions against private employers. In transferring to the Commission the Attorney General's pattern or practice functions under Section 707, Congress made explicit that it was transferring only the authority that the Attorney General enjoyed at the time the transfer provision was enacted, *i.e.*, the authority to bring pattern or practice suits against private employers (S. Rep. No. 92–415, 92d Cong., 1st Sess. 28 (1971) (emphasis added)):

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[44] *United States* v. *Masonry Contractors Association of Memphis, Inc.*, 497 F. 2d 871, 876 (C.A. 6). See also *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418, 438 (C.A. 5), certiorari denied, 406 U.S. 906; *United States* v. *International Association of Bridge, Structural and Ornamental Iron Workers*, 438 F. 2d 679, 680–682 (C.A. 7), certiorari denied, 404 U.S. 830.

Prior to the 1972 amendments to Title VII, it was well settled that the Attorney General's authority to bring a pattern or practice suit under Section 707 was not circumscribed by any of the Section 706 procedural requirements applicable to the Commission. See *United States* v. *Masonry Contractors Association of Memphis, Inc.*, *supra*.

> The authority to bring "pattern or practice" suits directly in the district courts, as provided by section 707 of the present law, is amended by section 5 of the bill which transfers the *present* section 707 functions from the Attorney General to the Commission.

Section 707(c) was not intended to alter the Attorney General's future Section 707 functions under the 1972 Act to initiate pattern and practice litigation against the states.

Nor is the Attorney General's authority under Section 707(a) altered by Section 707(e), which provides that "the Commission shall have authority to investigate and act on a charge of pattern or practice of discrimination" and that "[a]ll such actions shall be * * * in accordance with the procedures set forth in section 2000e–5 * * *." These provisions are properly interpreted in light of the congressional intent to address Section 706 to individual grievances and in Section 707 "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices * * *." *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 843 (C.A. 5), certiorari denied *sub nom. National Organization for Women, Inc.* v. *United States*, 425 U.S. 944.[45]

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[45] In its recent report on the Enforcement of Equal Opportunity and Antidiscrimination Laws in Public Broadcasting, the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce stated that, as to Title VII enforcement, the Department of Justice had enforcement responsibility

Since there is no legislative history reflecting a congressional intention that public sector pattern or practice suits be preceded by EEOC conciliation efforts, and no express referral requirement in Section 707 (a), the district court erred in reading such a requirement into the statute.

5. The government sought certification of a defendant class of all local school boards within the State primarily for purposes of obtaining back pay for those found to have been unlawfully denied employment or appropriate salaries as a result of defendants' discrimination. The district court denied plaintiffs' motion to certify on the ground that, in light of differences among the policies of the 92 school districts in South Carolina with respect to hiring, salary and tenure of teachers, it had not been shown that there are questions of law or fact common to the class (NEA App. 4a–5a).

The district court erred. This case presents common questions of both law and fact. The public school districts in the State all adhere to hiring and salary scale policies based on the levels of teacher certification issued by the State (NEA App. 3a). Every school district differentiates in salary both between teachers who possess professional certificates and those who

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"[u]pon referral from EEOC where [a] complaint involves State or local government *or on its own initiative where State agencies are engaged in a pattern or practice* of employment discrimination." H.R. Committee Print No. 95–12, 95th Cong., 1st Sess. 3 (1977) (emphasis added).

possess warrant certificates [46] and between those holding either professional or A certificates and those holding B, C, or D certificates (Exs. P-TP-4, P-TP-8, P-EW-1). Even if different school districts have different policies regarding which certificate holders may be hired, each considers the NTE-based certification level in determining which are hired and which salary schedule applies to them.[47] As a result of this common factual pattern, the legal question that is also common to the 92 public school districts in South Carolina is whether the practice of basing the size of a teacher's salary and local supplements on his certification level and NTE score violates Title VII and the Fourteenth Amendment. This common question of law is, itself, sufficient for Rule 23, Fed. R. Civ. P., certification. *Like* v. *Carter*, 448 F. 2d 798 (C.A. 8), certiorari denied, 405 U.S. 1045.[48]

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[46] Because prior to 1969 four different certificates were issued and each certificate grade had a corresponding salary schedule, those teachers certified before 1969 who hold "B," "C," or "D" certificates still receive a correspondingly smaller salary than the "A" or professional certificate holders.

[47] Facts peculiar to each school district may be determined after the common factual questions have been resolved, and the existence of such facts does not destroy the permissibility of maintaining suit as a class action. See *Esplin* v. *Hirschi*, 402 F. 2d 94, 99 (C.A. 10).

[48] The Rule 23(a) requirements of numerosity, typicality and adequacy of representation have also been met. See *Cypress* v. *Newport News General and Nonsectarian Hospital Ass'n*, 375 F. 2d 648 (C.A. 4) (numerosity); *Penn* v. *San Juan Hospital, Inc.*, 528 F. 2d 1181 (C.A. 10) (typicality); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (C.A. 3), certiorari denied, 421 U.S. 1011 (adequacy of representation). Plaintiffs have also met the

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted.

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OCTOBER 1977.

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requirement of Rule 23(b)(1)(B) that an adjudication with respect to individual members would, as a practical matter, be dispositive of the interests of the other class members. See *United States* v. *Cantrell*, 307 F. Supp. 259, 261 (E.D. La.).

APPENDIX A

In the District Court of the United States for the District of South Carolina, Columbia Division

Civil Action No. 75–1610

UNITED STATES OF AMERICA, PLAINTIFF

AND

SOUTH CAROLINA EDUCATION ASSOCIATION, ET AL.,

PLAINTIFF-INTERVENORS

v.

STATE OF SOUTH CAROLINA, DEFENDANTS

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the United States appeals to the United States Supreme Court from the Order and Judgment of this Court entered in the above styled proceeding on April 14, 1977. This appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 2000e–6(b).

Respectfully submitted,

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Filed, June 13, 1977

APPENDIX B

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, Stat. 261, as added, 86 Stat. 105, 42 U.S.C. (Supp. V) 2000e–5(f)(1), provides in pertinent part:

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.* * *

Section 707 of Title VII of the Civil Rights Act of 1964, 78 Stat. 261, as added, 86 Stat. 107, 42 U.S.C. (and Supp. V) 2000e–6, provides in pertinent part:

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the

full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case.* * *

* * * * *

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conduced in accordance with the procedures set forth in section 2000e–5 of this title.

U.S. GOVERNMENT PRINTING OFFICE: 1977